Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1638

JAMES E. CRANE; JAMES E. CRANE, M.D., P.C.; and JAMES E. CRANE and MARY ELLEN CRANE, TRUSTEES OF JAMES E. CRANE, M.D., P.C. PENSION TRUST (on behalf of themselves and investors similarly situated),

Petitioners,

v.

LESLIE A. BARTH; BERGMAN AND BARTH, P.C.; PIERSON, DUEL & HOLLAND; and RITCH, GREENBERG & HASSAN,

Respondents.

BRIEF OF RESPONDENTS BERGMAN AND BARTH, P.C. AND LESLIE A. BARTH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This brief is submitted in opposition to plaintiffs' petition for a writ of certiorari. Plaintiffs seek review of the judgment of the United States Court of Appeals for the Second Circuit entered on January 5, 1978 which affirmed the judgment of the United States District Court for the Southern District of New York dismissing the second amended complaint on the ground that it fails to meet the requirements of Fed. R. Civ. P. 9(b). Respondents Bergman and Barth, P.C. and Leslie A. Barth oppose the issuance of a writ of certiorari because of the lack of any conflict of decision with other courts of appeal, the absence of any issue of significance in the administration of the

federal securities laws and the fact that the decision below was clearly correct.

Respondents Bergman and Barth, P.C. and Leslie A. Barth are attorneys, as are respondents Pierson, Duel & Holland. Respondents Ritch, Greenberg & Hassan are accountants. All of the respondents are hereinafter collectively referred to as the "professional defendants".

Question Presented

The question presented by the petition for a writ of certiorari is: did the United States Court of Appeals for the Second Circuit abuse its discretion in affirming dismissal of the second amended complaint against the professional defendants on the ground that it failed to allege fraud with the particularity required by Fed. R. Civ. P. 9(b)?

Statement of the Case

1. Nature of This Action and the Parties

This action was commenced on November 26, 1975 by the filing of a complaint alleging violations of § 17(a) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77q(a), §§ 10(b), 15(c) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j (b), o(c) and t(a), respectively, and S.E.C. Rules 10-b, 10b-5 and 15c 1-2. The first amended complaint added an alleged violation of Securities Act § 5, 15 U.S.C. § 77e, which later was abandoned. The second amended complaint added an alleged violation of § 12(2) of the Securities Act, 15 U.S.C. § 77*l*(2).

The only federal claims presently asserted by plaintiffs are under § 10(b) of the Exchange Act, and §§ 12(2) and

17(a) of the Securities Act. (4)* Plaintiffs also have asserted claims, relying on pendent jurisdiction, for reckless, wanton and/or willful acts and representations by defendants; negligent representations, and breach of fiduciary relationship.

The plaintiffs are Dr. James E. Crane, individually, as a trustee of his pension trust and as a professional corporation, and his wife, Mary Ellen Crane, as trustee of Dr. Crane's pension trust. Plaintiffs seek to recover losses allegedly sustained on their limited partnership investments in three real estate tax shelters. The nature and date of purchase of these interests were as follows:

a) a limited partnership interest in Reading-Easton Associates—purchased on November 15, 1972 for $26,000. (10a)**

b) a limited partnership interest in Carlene Tower Associates—purchased on June 15, 1973 for $13,000 *(id.)*; and

c) a debenture issued by Clementon Associates purchased on January 1, 1974 for $7,500. *(Id.)*

The defendants are: the corporation which formed the limited partnerships and sold interests therein to the public—Stonehenge Industries, Inc. ("Stonehenge"); the officers and directors of Stonehenge—Messrs. Constantine, Ward and Henderson; Howard N. Garfinkle, who allegedly sold real estate properties to Stonehenge and improperly obtained and misappropriated funds from Stonehenge; the sales representatives of Stonehenge—Grayson Securities, Inc. and Arthur Grayson; and every lawyer and accountant

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* References are to pages of the Petition for a Writ of Certiorari unless otherwise indicated.

** References designated ("—a") are to pages of the Appendix filed by petitioners.

who rendered any professional services to Stonehenge including Ritch, Greenberg & Hassan ("Hassan") certified public accountants; Donald L. Lawrence, an attorney; Pierson, Duel & Holland, attorneys; and Leslie A. Barth and Bergman and Barth, P.C., attorneys.

2. Prior Proceedings

Defendants Hassan and Pierson, Duel & Holland moved to dismiss the original complaint on several grounds including plaintiffs' failure to comply with Fed. R. Civ. P. 9(b) and their failure to state a claim upon which relief can be granted. The original complaint was dismissed on May 27, 1976 with leave to replead. An amended complaint was filed on June 14, 1976 but it was as deficient as the original and new motions to dismiss were filed.

On September 7, 1976 the District Court dismissed the amended complaint as to Pierson, Duel & Holland, stating that it "fails utterly to set forth a specific fact from which it could be concluded that there is a connection between the defendant law firm and the alleged wrongful conduct" and that it lacked the specificity mandated by Rule 9(b).

On September 23, 1976 and November 30, 1976 the amended complaint also was dismissed as to Hassan and Leslie A. Barth and Bergman and Barth, P.C., respectively, on Rule 9(b) grounds.

Thereafter, plaintiffs moved for reconsideration of the dismissals and for leave to file a second amended complaint. Leave was granted and a second amended complaint was filed on December 20, 1976. That complaint proved to be a rehashed version of its predecessors and defendants were compelled to move once again. This time the District Court granted the motions, with prejudice, noting that although "facially rearranged" the third complaint contained "no greater specificity than before". (108a) The

complaints relating to Hassan, Bergman & Barth, P.C. and Leslie A. Barth similarly were dismissed on Rule 9(b) grounds. (101a-106a and 113a-117a)

The Court of Appeals affirmed the judgments of dismissal on the basis of the District Court's decision. (119a-120a)

3. Analysis of the Second Amended Complaint*

The very first sentence of the complaint signals its insufficiency through the statement that each and every allegation is upon information and belief except paragraphs 1-10. The complaint is not accompanied by any statement of the facts upon which the belief is founded.

The first ten paragraphs of the complaint, the only allegations made with knowledge, refer to jurisdiction (¶ 1); claimed violations of §§ 12 and 17(a) of the Securities Act, and § 10 of the Exchange Act (¶ 2), as well as other claimed violations of the securities laws in the sale of limited partnership interests through Stonehenge which are no longer in issue; venue (¶ 3); the appropriateness of class action certification under Fed. R. Civ. P. 23 (¶ 4); the applicability of the factual allegations to all plaintiffs (¶ 5); the composition and common interests of the class (¶ 6); the identity of the plaintiffs and the limited partnerships in issue (¶ 7); assertions by plaintiffs of their commencement of the action as a class action (¶ 8); identification of the specific purchases by Crane, and the dates and amounts of these purchases (¶ 9), and allegations that sales and solicitations were made by use of the mails (¶ 10).

All of the remaining allegations, as summarized below, are pleaded on information and belief.

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* The Second Amended Complaint appears at pages 1-94 of the Appendix.

The complaint alleges that Stonehenge organized limited partnerships as real estate syndications which were offered and sold to the public; that Stonehenge, Constantine and Ward were general partners and that Constantine, Ward and Henderson were officers and directors of Stonehenge (¶ 11(a)); that Garfinkle sold the properties acquired by the limited partnerships, became the "wrap around mortgagee" and was able to misappropriate mortgage payments; that he colluded with Stonehenge, Constantine, Ward and Henderson, and that he "was aided and abetted by the other defendants herein" (¶ 11(b)). There follows a description of defendants Grayson Securities and Grayson (¶ 11(c)) and Donald Lawrence, Esq. (¶ 11(b)).

The complaint then describes the purpose of the three limited partnerships—to acquire and operate real estate (¶ 11a)—and claims that the organization, operation and sale of the limited partnerships were steeped in fraud and deception and that the fraud led to an S.E.C. injunction against such practices (¶ 12). The complaint *carefully omits* the uncontested fact that the S.E.C. never took action against or enjoined any of the professional defendants.

Paragraphs 14 and 15 constitute the crux of plaintiffs' complaint. They restate the theme found in the amended and original complaints and in the instant Petition. (16) Both paragraphs reveal that the claim against the professional defendants is based on supposition rather than fact. Plaintiffs claim, in *res ipsa loquitur* fashion, that the fraud in the sale of the limited partnerships "could not be perpetrated without the services and cooperation of professionals such as the defendant accountants and lawyers" (¶ 14); that "[a]t the very least, there were highly suspicious circumstances [that] should have been investigated" (¶ 15); and that the "defendant accountants and lawyers

shut their eyes to those circumstances, and made no inquiry into them, and made no disclosure, and thereby aided and abetted the deceptive concealment worked on Crane and the other investors." *Id.*

The manner in which the fraud occurred is set forth following allegations that relevant information was concealed from plaintiffs (¶ 16); that limited partnership interests were offered to numerous investors in various states; that substantial monies were realized on such sales (¶¶ 17, 18), and that the S.E.C. had asserted a requirement for registration prior to such sales (¶ 19).

The complaint then recites a litany of supposed facts and events which all of the defendants "knew or should have known" or "willfully and recklessly disregarded," and as to which there was no disclosure. *It is noteworthy that all of these allegations involved acts, misrepresentations and omissions of Stonehenge, its officers and Garfinkle. None involved any of the professional defendants.*

The allegations are that the professional defendants should have known of the requirements asserted by the S.E.C. (¶ 20); that the sale of the limited partnership interests constituted unlawful sales of securities (¶ 21); that the properties acquired by Stonehenge from Garfinkle involved collusion and the absence of arm's length negotiations (¶ 22); that Garfinkle had a criminal record (¶ 23); that although the securities were offered as "tax shelter investments" in honestly managed entities, the real properties were acquired, sold and managed for the benefit of Garfinkle, Stonehenge and its officers (¶ 24); that Garfinkle obtained properties for little or no cash, and by placing junior mortgages against the properties (¶ 25); that Stonehenge paid Garfinkle substantially more for the properties than he had paid (¶ 26); that Stonehenge assumed various

mortgages so that the properties produced insufficient cash flow for debt service (*id.*); that by using a "wrap around mortgage" granted to him, Garfinkle controlled the manner in which junior mortgages were paid (¶ 27); that no escrow fund was set up (¶ 28); that Stonehenge exercised no control over the properties, and that Garfinkle misappropriated funds earmarked for the payment of mortgages (*id.*); that Garfinkle controlled the management and operation of the properties through certain agreements and arrangements (¶ 29); that Stonehenge prepaid certain interest payments to Garfinkle which he did not use to pay junior mortgages (¶ 30); that the properties purchased by plaintiffs were being foreclosed or had been foreclosed, and that the plaintiffs had suffered serious financial losses (¶ 31); that the properties were poorly managed (¶ 32); that the limited partnerships were poorly managed and their funds wasted (¶¶ 33, 34); that Stonehenge and its officers accepted information from Garfinkle with respect to the properties without independent verification which information Stonehenge in turn relied on and used for the purpose of soliciting investors (¶ 35); and that Stonehenge issued literature that referred to non-existent financing possibilities. (¶ 36). Once again we pause to emphasize that all of these charges, whether or not true, have absolutely no relationship to any acts taken by the professional defendants.

Paragraph 37 of the complaint makes plain that the professional defendants played no part in the solicitation or sales of securities and never distributed any offering brochures. That was done by Stonehenge, its officers and its sales representatives. Plaintiffs merely state, generally, that the efforts of Stonehenge were "aided and abetted" by "defendants Barth, Bergman and Barth, Pierson, Duel & Holland and Ritch, Greenberg & Hassan". (¶ 37).

Although paragraph 37 lists all of the ways in which the sales efforts and circulars were false and misleading, *there is not the slightest specification of how the professional defendants aided and abetted.* The most that plaintiffs ever have said is that the professional defendants shut their eyes to those circumstances, made no inquiry and made no disclosure (¶ 15). There are general allegations in paragraph 41 that *all* of the professional defendants prepared *all* of the offering brochures for *all* of the investments in Reading-Easton, Carlene and Clementon.

I.

The Decision of the United States Court of Appeals for the Second Circuit Affirming Dismissal of the Complaint is Clearly Correct.

Fed R. Civ. P. 9(b) states in relevant part:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Rule 9(b) has been vigorously enforced, especially where securities law fraud is alleged against professionals such as attorneys or accountants. *Segal* v. *Gordon*, 467 F.2d 602, 607 (2d Cir. 1972); *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2d Cir. 1971); *O'Neill* v. *Maytag*, 339 F.2d 764, 768 (2d Cir. 1964). As the court held in *Segal* v. *Gordon, supra*, 467 F.2d at 607:

> "Rule 9(b)'s specificity requirement stems not only from the desire to minimize the number of strike suits but also more particularly from the desire to protect defendants from the harm that comes to their reputa-

tions or to their goodwill when they are charged with serious wrongdoing:

> It is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically. [footnote omitted]
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> • • •
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> . . . 'Mere conclusory allegations to the effect that defendant's conduct was fraudulent or in violation of 10b-5 are insufficient [citations omitted];' '[m]ere general allegations that there was fraud, corruption or conspiracy or characterizations of acts or conduct in these terms are not enough no matter how frequently repeated [citations omitted].'"

It is widely recognized that this rule is essential if the law is to protect professionals from being slandered by premature and unfounded general accusations—from suits brought prior to any meaningful investigation. The requirements of Rule 9(b) are "necessary to safeguard potential defendants from lightly made claims charging commissions of acts that involve some degree of moral turpitude." 5 Wright & Miller, *Federal Practice and Procedure*, § 1296 at 339.

As stated in *Sloan* v. *Canadian Javelin, Ltd.*, CCH Fed. Sec. Law Rep. (1973-74 Transfer Binder), ¶ 94, 579 at p. 96,033 (S.D.N.Y. 1974): "Because allegations of fraud made against accountants and others whose business depends on clients' trust and confidence can threaten their entire professional status, Rule 9(b) requires that plaintiffs set forth more completely than in an ordinary complaint the factual circumstances that allegedly entitle them

to relief. [Citations omitted]" In *Rich* v. *Touche Ross & Co.*, 68 F.R.D. 243, 245 (S.D.N.Y. 1975) the court stated:

> "The requirement that allegations of fraud be pleaded with particularity stems from, among other sources, a concern that potential defendants be shielded from lightly made public claims or accusations charging the commission of acts or neglect of duty which may be said to involve moral turpitude. C. Wright & A. Miller, Federal Practice and Procedure, § 1296. *The need for this protection is most acute where the potential defendants are professionals whose reputations in their field of expertise are most sensitive to slander.* See Felton v. Walston and Co., Inc., 508 F.2d 577, 581-582 (2d Cir. 1974). Apart from the prejudicial and *in terrorem* effects of fraud allegations a defendant in a fraud action requires particularized information in order to understand what conduct is complained of and to prepare a defense to such a claim of misconduct." (Emphasis supplied)

In *Rich* the complaint alleged that an accountant had (a) certified false and misleading financial statements; (b) failed to disclose violations of the federal securities laws by Weis [the defunct brokerage house]; (c) failed to disclose violation of the net capital rule and more specifically Rule 325 of the New York Stock Exchange; (d) certified false financial reports; (e) certified and prepared inaccurate financial statements; and (f) failed to disclose that it had certified and filed with the SEC false financial reports. 68 F.R.D. at 246. The court stressed the rule particularly applicable to this case—that it is not sufficient merely to list a series of alleged wrongs. The crucial allegations are " 'the time, place and content of the false misrepresentation, the fact misrepresented and what was obtained or given up as a consequence of the fraud'. 2A

J. Moore, Federal Practice ¶ 9.03" *Id.* The court concluded that the defendant should at least be apprised of what the plaintiff must prove in order to meet its burden:

> "In order to sustain their burden of proof on the merits of their claim, *plaintiffs will have to demonstrate that they relied upon false statements made by Touche Ross or that omissions fraudulently made by those accountants were the cause of plaintiffs' damages.* . . . [I]t is not an unreasonable burden to expect the plaintiffs to be able to identify the misstatements, omissions or fraud that caused them to engage in particular securities transactions." [Citation omitted; emphasis supplied]. 68 F.R.D. at 247.

Similarly, in *Gross* v. *Diversified Mortgage Investors,* 431 F. Supp. 1080, 1087 (S.D.N.Y. 1977), the court articulated the rationale behind Rule 9(b)'s specificity requirement:

> "There are at least three well-recognized purposes for Rule 9(b)'s specificity requirement. The first is to inhibit the filing of a complaint as a pretext for discovery of unknown wrongs. *Segal* v. *Gordon, supra* at 607-08; *Lewis* v. *Varnes,* 368 F. Supp. 45, 47 (S.D. N.Y.), *aff'd,* 505 F.2d 785 (2d Cir. 1974). A complaint alleging fraud 'should serve to redress a wrong, not to find one.' *Segal* v. *Gordon, supra* at 608. The second aim is to protect potential defendants from the harm that comes to their reputations when they are charged with the commission of acts involving moral turpitude. *Segal* v. *Gordon, supra* at 607; *Rich* v. *Touche Ross & Co.,* 68 F.R.D. 243, 245 (S.D.N.Y. 1975). Finally, Rule 9(b) serves to ensure that allegations of fraud are concrete and particularized enough to give notice to the defendants of what conduct is complained of to

> enable the defendants to prepare a defense to such a claim of misconduct. *Rich* v. *Touche Ross & Co., supra* at 245; *Lewis* v. *Varnes, supra* at 47; see *Felton* v. *Walston & Co.,* [508 F.2d 577, 580 (2d Cir. 1974)]."

In this case plaintiffs have submitted a detailed list of the alleged wrongs committed by Stonehenge and other business people, but there has not been a single allegation that the professional defendants made *any representation* whatsoever to plaintiffs, much less a *false* representation; not a single allegation as to the time, place and content of a false representation or the fact misrepresented; not a single allegation as to any reliance by plaintiffs on any representation by the professional defendants; not a single allegation as to any damage caused by any misplaced reliance; and not a single allegation that the professional defendants were connected with plaintiffs' purchases of limited partnership interests. Instead of facts, plaintiffs' complaint contains repetitive allegations that all of the defendants "knew or should have known" various alleged facts and that all of the defendants "aided or abetted" each other.

Courts have repeatedly condemned such pleadings for their failure to comply with Rule 9(b). *See, e.g., Halcyon Securities* v. *Chase Manhattan Bank,* CCH Fed. Sec. L. Rep. (1977-78 Transfer Binder), ¶ 96,212 at p. 92,460-61 (S.D.N.Y. 1977); *Plum Tree, Inc.* v. *N.K. Winston Corp.,* 351 F. Supp. 80, 85 (S.D.N.Y 1972); and *Fershtman* v. *Schectman,* CCH Fed. Sec. Law Rep. (1970-71 Transfer Binder), ¶ 92,996, p. 90,677 (S.D.N.Y. 1971), *aff'd on other grounds,* 450 F.2d 1357 (2d Cir. 1971), *cert. denied,* 405 U.S. 2066 (1972). In *Fershtman,* at p. 90,678, the court dismissed a complaint against accountants brought by buyers of limited partnership interests who, like petitioners herein,

claimed violations of §§ 12(2) and 17(a) of the Securities Act and ¶ 10 of the Exchange Act upon the basis of allegations that the accountants "aided and abetted the Managing Partners in their misrepresentations, fraud, deceit and conspiracy. . . ." The court specifically held that the "aided and abetted * * * conspiracy" language was no substitute for the specific factual allegations required by Rule 9(b). *Id.*

Plaintiffs' close tracking of statutory language does nothing to save their complaint from its fatal defects under Rule 9(b). Indeed, the instant claims, similar to those in *Segal* v. *Gordon, supra,* "are obviously founded more on an examination of Rule 10b-5 than on an investigation of the facts of the alleged fraud." 467 F.2d at 608. As the *Segal* court stated:

> "A complaint cannot escape the charge that it is entirely conclusory in nature merely by quoting such words from the statutes as 'artifices, schemes, and devices to defraud' and 'scheme and conspiracy.'" 467 F.2d at 608.

As plaintiffs admit in paragraph 9 of the complaint, they received one offering brochure as early as November 15, 1972 and the last by January 1, 1974. Plaintiffs have had more than four years to study the offering brochures; two years to investigate since they learned of the alleged fraud in 1975, and well over a year since the original complaint was filed. Until July 1, 1977, when their third complaint (the second amended complaint) was dismissed, plaintiffs had not alleged a single specific fact connecting the professional defendants to the preparation, review, circulation or content of the offering brochures. Instead, and at most, we have the general accusations that *all* of the professional defendants prepared the brochures (¶ 41); that

the alleged fraud could not have been perpetrated without the services and cooperation of the professional defendants (¶ 14); that all of the professional defendants "shut their eyes" to "suspicious circumstances" and thereby aided and abetted (¶ 15) and that if "one or more of the defendants dis [sic] not directly or indirectly commit or were not responsible for one or more of the acts or omissions hereinabove alleged, they aided and abetted the same." (¶ 39)

Plaintiffs' broad brush attempt to smear all of the professional defendants with a general allegation, that all of them prepared unspecified portions of all of the brochures, is patently improper.

In *Lincoln National Bank* v. *Lampe,* 414 F. Supp. 1270, 1278-9 (N.D. Ill. 1976), the court rejected the very same tactic, stating that the complaint *must* inform each defendant of the specific fraudulent acts which constitute the basis of the plaintiffs' claim against each defendant. It cannot lump alleged misrepresentations in an effort to imply that each defendant is responsible for statements made by the others.

As a matter of law, a complaint should not be filed to seek out possible fraud by a particular party. *Segal* v. *Gordon, supra,* at 607-08. The practice of filing a complaint lacking in particularity and then seeking discovery to establish a wrong has been soundly condemned. *Segal* v. *Gordon, supra; Rich* v. *New York Stock Exchange,* 522 F.2d 153, 158 (2d Cir. 1975); *Segan* v. *Dreyfus Corp.,* 513 F.2d 695, 696 (2d Cir. 1975). As observed in the *Dreyfus* decision:

> "When the complaint alleges fraud, Rule 9(b) requires that somewhat more of counsel's investigative efforts be revealed so that the number of unfounded 'strike suits' is minimized and defendants are protected 'from the harm that comes to their reputations or to their

goodwill when they are charged with serious wrongdoing.'" [Citation omitted]. *Id.*

The complaint herein sets forth no specific facts from which it could be reasonably concluded that there is a connection between any of the professional defendants and the alleged wrongful conduct. On the contrary, the complaint serves as a model of a "strike suit" pleading, replete with general accusations. The continuing professional embarrassment to these defendants is manifest and properly was not permitted on the basis of a complaint that so clearly failed to meet the requirements of Fed. R. Civ. P. 9(b).

Examination of the claims against respondents Leslie A. Barth and Bergman & Barth, P.C. (the "Barth firm") shows that they are based upon the theory, stated in the complaint (¶ 14), that the alleged fraud in the sale of limited partnership interests "could not be perpetrated without the services and cooperation of professionals such as the defendant accountants and lawyers." * Of course, it is apparent that plaintiffs cannot and do not allege that the Barth firm either offered or sold securities to plaintiffs or anyone else. Plaintiffs cannot and do not allege that the Barth firm participated in the solicitation of plaintiffs or rendered any encouragement or assistance to such solicitation. Plaintiffs cannot and do not allege that the Barth firm was aware of the sales to plaintiffs or that it had actual knowledge of the specific fraud that was allegedly perpetrated upon plaintiffs or that it acted in concert with

* The counts alleged against the Barth firm are the First Count (which is alleged against all defendants and is based upon alleged violations of the federal securities laws), the Fourth Count (the only count directed solely at the Barth firm) and the Seventh, Eighth and Ninth Counts (which are alleged against all defendants).

others to perpetrate the fraud. In other words, plaintiffs are unable to allege any specific facts from which it could be concluded that there was any connection between the fraud allegedly perpetrated by Stonehenge, its officers and directors and Garfinkle on the one hand and the professional services rendered by the Barth firm on the other hand.

Since plaintiffs cannot connect the Barth firm with the alleged fraud by any specific factual allegations, they seek to sustain their second amended complaint on the basis of the allegation that "defendant accountants and lawyers shut their eyes" to suspicious circumstances and "thereby aided and abetted the deceptive concealment worked on Crane and the other investors." (¶ 15). However, plaintiffs set forth no factual basis for these allegations. The complaint, again, is completely deficient in that it fails to show that the Barth firm knew of the alleged fraud or knowingly and intentionally assisted or participated in it. The complaint fails utterly to specify the respects in which the Barth firm is alleged to have aided and abetted and was, therefore, properly dismissed. *Segal* v. *Gordon, supra; Rich* v. *Touche Ross & Co., supra; Lincoln National Bank* v. *Lampe, supra.*

Indeed, the only specific criticism of the Barth firm to be found in the entire complaint is directed to its tax opinion in connection with Clementon. (70a-77a, 93a-94a). Examination of the tax opinion (93a-94a) shows that it is of a kind commonly given in connection with the syndication of limited partnership interests in real estate investments. What is significant here is that *there are no allegations demonstrating any connection between the standard tax opinion letter of the Barth firm and the fraud perpetrated by those alleged in the complaint to be the wrongdoers,* i.e.,

Stonehenge, its officers, directors and Garfinkle. The Barth firm was only consulted in a professional advisory capacity, and on an extremely limited basis, as tax counsel in connection with Clementon. The Barth firm had no meaningful involvement with the underlying real estate transactions or the sale of limited partnership interests.

In discussing the Barth firm's tax opinion letter, the District Court stated (116a-117a):

> "This tax opinion letter is specifically identified and attached to the complaint as an exhibit. However, plaintiffs have failed to allege specifically how this tax opinion letter is false or misleading. It appears that plaintiffs have brought this action on the theory that since defendants prepared a standard tax opinion letter, they must have known of all the wrongdoing allegedly perpetrated in this case. A reading of the tax opinion letter makes it clear that none of the alleged wrongdoing had to be known by movants in order to make the tax opinion letter complete for its intended purpose."

We respectfully submit that the foregoing analysis of the United States District Court for the Southern District of New York, adopted by the United States Court of Appeals for the Second Circuit, is correct.

II.

There is No Conflict Between the Decision of the United States Court of Appeals for the Second Circuit and the Decisior of Any Other Court of Appeals and There is No Other Ground for Granting A Writ of Certiorari.

Petitioners' chief contention in support of their petition is that "The writ should be granted because there is a conflict between the decision of the court below in the instant case and the decisions of courts of appeal and district courts in other circuits." (17) As we shall show, contrary to petitioners' contention, there is no conflict between the decision of the court below and the decision of any other court of appeals. The alleged conflict between the decision of the court below and district courts in other circuits is not only non-existent but would, in any event, not be a basis for granting a writ of certiorari.

The only court of appeals cases cited by petitioners are *Tomera* v. *Galt*, 511 F.2d 504 (7th Cir. 1975) and *Dudley* v. *Southeastern Factor & Finance Corp.*, 446 F.2d 303 (5th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971). Neither is in conflict with the decision of the court below. In *Tomera*, the complaint alleged that it was represented to plaintiff that the three corporate defendants formed to promote a Mexican mining venture "held valid mine leases in Mexico, were carrying on silver mining operations and processing the ore, and planned to use the funds [plaintiff] invested to further develop the mine property and facilities. In fact none of this vital information was true." 511 F.2d at 508. It appears from the court's decision that all of the individual defendants were officers, directors and promoters of the corporate defendants. In addition, some of

the individual defendants had entered into a written joint venture agreement in connection with the promotion of the mining venture which was attached to the complaint. From this description, it is apparent that the complaint in *Tomera* specifically alleged that the individual defendants were the primary perpetrators of a fraud. In contrast, the complaint dismissed by the courts below makes no claim that the professional defendants perpetrated a fraud and, moreover, fails utterly to connect them with the alleged fraud. Thus *Tomera* is completely distinguishable from the instant case: there is no conflict between the decision therein and the decision of the court below in their interpretation of Fed. R. Civ. P. 9(b).

In *Dudley* v. *Southeastern Factor and Finance Corp.*, 446 F.2d 303 (5th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971), which petitioners cite but do not discuss, the receiver of a corporation claimed that it had been defrauded in violation of Rule 10b-5. Defendants were a finance corporation which had allegedly accomplished the fraud by means of a fraudulent dissolution and liquidation, "its principals, its shareholders as a class, and other corporations." 446 F.2d at 304. Thus, it is apparent that the defendants in *Dudley*, like the defendants in *Tomera, supra*, were the principal perpetrators of the fraud alleged in the complaint. Accordingly, *Dudley* is also easily distinguishable from this case. Thus there is no conflict between the decision therein and the decision of the court below.

While the foregoing description of *Dudley, supra*, shows that it is inapposite, it is also pertinent to note that the principal question before the court was whether or not plaintiff had standing to sue as a defrauded "seller" within the meaning of Rule 10b-5. The only reference to Fed. R. Civ. P. 9(b) was contained in footnote 6 on page 308 of the court's decision and that reference does not furnish any

support for the assertion that the court in *Dudley, supra*, interpreted Rule 9(b) differently than the court below.

The remaining cases cited by petitioners for the proposition that there is a conflict of decision are all district court cases: *Fox* v. *Prudent Resources Trust*, 382 F. Supp. 81 (E.D. Pa. 1974); *Burkhart* v. *Allson Realty Trust*, 363 F. Supp. 1286 (N.D. Ill. 1973); *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972); and *Cash* v. *Frederick & Company, Inc.*, 57 F.R.D. 71 (E.D. Wis. 1972). (18) It is well established that this Court

> "will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit. The Court tries only to achieve uniformity in federal matters among the various courts whose decisions are otherwise final in the absence of Supreme Court review—[such as] the courts of appeals. . . . It is the duty of the courts of appeals to maintain uniformity within their respective circuits and to supervise the decisions of the various district courts." Stern and Gressman, *Supreme Court Practice*, (4th Ed. 1969), Sec. 4.8.

Moreover, each of the district court cases is distinguishable on the same basis as *Tomera* v. *Galt, supra*, and *Dudley* v. *Southeastern Factor and Finance Corp., supra*, as involving the application of Fed. R. Civ. P. 9(b) to allegations against insiders and primary fraud doers rather than persons in the position of the professional defendants.

We believe that the recent decision of the United States Court of Appeals for the Second Circuit in *Denny* v. *Barber, et al.*, No. 76-2946, slip op. at 3077 (2d Cir. May 17, 1978) is

directly on point. In that case, the court affirmed the dismissal of a complaint alleging violations of Rule 10b-5 on the ground, *inter alia*, that it failed to meet the requirements of Fed. R. Civ. P. 9(b). Speaking for the court, Judge Friendly stated:

> "Plaintiff's counsel has called our attention to a number of district court decisions, notably *duPont* v. *Wyly*, 61 F.R.D. 615 (D. Del. 1973), and *Denny* v. *Carey*, 72 F.R.D. 574 (E.D. Pa. 1976), in the latter of which he was counsel for the same plaintiff as here, which are alleged to have sustained complaints no more specific than this. Defendants dispute this and counter with an equal number of district court decisions alleged to have dismissed complaints more specific than this one. We see no profit in attempting to analyze these decisions, which may or may not be consistent and each of which necessarily rests on its particular facts. We follow the rule laid down by our own decisions, notably *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2 Cir. 1974); *Segal* v. *Gordon*, 467 F.2d 602, 607 (2d Cir. 1972), *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 378-80 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1965), and *Felton* v. *Walston and Co.*, 508 F.2d 577 (2 Cir. 1974)."

In other words, each decision under Fed. R. Civ. P. 9(b) by its very nature—to use the words of Judge Friendly—"necessarily rests on its particular facts." Thus this case turns solely upon the district court's analysis of the particular allegations contained in the second amended complaint. For this reason too, certiorari should be denied. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

The only other cases cited by petitioners are easily distinguishable and inapposite to the proposition that the

professional defendants had a duty to disclose in this case. (23-24) See *Lanza* v. *Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973).

Thus *Black & Co. Inc.* v. *Nova-Tech, Inc.*, 333 F. Supp. 468 (D. Ore. 1971), involved a determination, for jurisdictional purposes only, that attorneys who had prepared the legal papers necessary for a corporation to sell securities within Oregon were "participants" in a transaction so as to permit them to be served with process in California. The court specifically held that the issue before it was the attorneys' "participation" and not "the issue of liability". *Id.* at 472.

In *Lewis* v. *Walston & Co. Inc.*, 487 F.2d 617 (5th Cir. 1973), buyers of unregistered securities brought an action for their losses against a brokerage firm and a registered representative. They alleged violations of §§ 12(1) and 12(2) of the Securities Act of 1933 and the Florida Blue Sky Law. Following a jury verdict against both defendants, the district court granted judgment n.o.v. in favor of the brokerage firm. The buyers and the registered representative appealed. The court of appeals affirmed the judgment against the registered representative, reversed the judgment in favor of the brokerage firm and remanded the case for entry of judgment against the brokerage firm. It is difficult to understand how this case has any bearing on whether the professional defendants had a duty to disclose in the instant case.

U. S. v. *Natelli*, 527 F.2d 311 (2d Cir. 1975) involved criminal charges against an accountant who knowingly issued false and misleading financial statements. *U. S.* v. *Benjamin*, 328 F.2d 854 (2d Cir.) *cert. denied sub nom. Howard* v. *United States*, 377 U.S. 953 (1964), involved an attorney who prepared and delivered misleading opinion letters concerning the shares that were sold.

None of these cases has any bearing upon the issue before this Court, that is, whether or not certiorari should be granted. Indeed, they serve only to emphasize that this case has no importance beyond the particular facts and parties involved. It is impossible to discern in the petition before this Court any question of significance in terms of interpretation of any federal statute or the administration of the federal courts. The petition fails completely to set forth any considerations of the character enumerated in Rule 19 of this Court which traditionally have influenced the Court to grant certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: New York, New York
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Respectfully submitted,

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